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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1950

No. 365

JAY G. WILLIAMS,

Petitioner,

vs.

THE UNITED STATES OF AMERICA

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

PETITIONER'S BRIEF

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Counsel for Petitioner.

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Opinion of the Court Below

The opinion of the court below, the Uni ed States Cou of Appeals for the Fifth Circuit, *Williams* v. *United State* has been reported in 179 Federal 2d 656.

Jurisdictional Statement

The judgment of the Court of Appeals of the Fifth Circuit was entered January 10, 1950. Writ of Certiorari was granted by this Honorable Court on October 16, 1950. The jurisdiction of this Court is invoked under Section 240 of the Judicial Code (Section 347, Title 28, U. S. Code), and Act of June 7, 1934, (Ch. 426, 48 Stat. 926).

Statement of the Case

Petitioner Williams, a private detective, was indicted, along with Peevy, Bombaci, Ford, Yuhas, and Lindsley Lumber Co., a corporation, in four counts under Section 52, Title 18, U. S. C. (Section 20, U. S. Criminal Code), for willfully depriving four persons (Purnell, Robinson, Sturnolo, and Priest) of rights, privileges, or immunities secured or protected by the Constitution and laws of the United States, and also in four counts, under Section 51, Title 28, U. S. C. (Section 19, U. S. Criminal Code), for conspiring to injure, oppress, or interfere with the same four individuals in the exercise of rights and privileges under the Constitution and laws of the United States. There was a mistrial of all of the Defendants under the four conspiracy counts under Section 51. There was a conviction of the Appellant Williams, on each of the four counts charging the substantive offenses under Section 52, but the other Defendants were acquitted under those counts.

Later there was a retrial of the four Defendants under a revised indictment on the conspiracy counts which resulted in all four being convicted, which conviction was reversed by the Court of Appeals for the Fifth Circuit *Williams et al.* v. *United States*, 179 Fed. 2d 644 and the United States of America applied for a Writ of Certiorari which was granted by this Court and the case docketed October term, 1950, Number 26.

The petition herein is by Williams from the Judgment of Affirmance of the Court of Appeals for the Fifth Circuit of his conviction and sentence under the four substantive counts under Section 52 of Title 18, U. S. C.[1]

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[1] Section 52 of Title 18, U. S. C., reads:

Whoever, under color of any law, statute, ordinance, regulation, or custom, willfully subjects, or causes to be subjected, any inhabitant of any State, Territory, or District to the deprivation of any rights, privileges,

The indictment charged, in Count 2, that the Appellant, together with Defendants Perry and Bombaci, were special police officers under written authority from the City of Miami, Florida, and acting under the laws of the State and ordinances and regulations of the municipality, who with Charles R. Ford, a police officer of the City of Miami, acting under the laws of the State, together with Andrew J. Yuhas and the Lindsley Lumber Company, did willfully, and under color of the laws, statutes, ordinances, regulations, and customs of the State of Florida and of the municipality of Miami, subject, and cause to be subjected, Frank J. Purnell, Jr., an inhabitant of the State of Florida, to deprivations of the rights, privileges, and immunities secured to him and protected by the Fourteenth Amendment to the Constitution of the United States, to wit:

> the right and privilege not to be deprived of liberty without due process of law, the right and privilege to be secure in his person while in the custody of the State of Florida, the right and privilege not to be subjected to punishment without due process of law, the right and privilege to be immune, while in the custody of persons acting under color of the laws of the State of Florida, from illegal assault and battery by any person exercising the authority of said State, and the right and privilege to be tried by due process of law and if found guilty to be sentenced and punished in accordance with the laws of the State of Florida; that is to say, on or about the 20th day of March, 1947, the defendants arrested and detained and caused to be arrested and detained the said Frank J. Purnell, Jr., and brought and caused him to be brought to and into a certain building sometimes called a shack on the

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or immunities secured or protected by the Constitution and laws of the United States or to different punishments, pains, or penalties, on account of such inhabitant being an alien, or by reason of his color, or race, than are prescribed for the punishment of citizens, shall be fined not more than $1,000, or imprisoned not more than one year, or both.

> premises of the Lindsley Lumber Co., at or near 3810 N. W. 17th Avenue, in said City of Miami, Florida, and did there detain the said Frank J. Purnell, Jr., and while he was so detained the defendants did then and illegally strike, bruise, batter, beat, assault and torture the said Frank J. Purnell, Jr., in order illegally to coerce and force the said Frank J. Purnell, Jr., to make an admission and confesson of his guilt in connection with the alleged theft of personal property, alleged to be the property of said Lindsley Lumber Co., and in order illegally to coerce and force the said Frank J. Purnell, Jr., to name and accuse other persons as participants in alleged thefts of personal property, alleged to be the property of the said Lindsley Lumber Co., and for the purpose of imposing illegal summary punishment upon the said Frank J. Purnell, Jr.

The other three substantive counts involved are identical except that in the other substantive counts 4, 6, and 8, Chester M. Robinson, Henry W. Priest, and John P. Sturniolo were successively and respectively named as the victims instead of Frank J. Purnell, Jr.

There was substantial evidence in this case to the effect that Williams, the owner and operator of a private detective agency in Miami, Florida, was employed by the Dania Supply Company, doing business as Lindsley Lumber Co., to investigate thefts from it of lumber and material. Williams had a special police card issued by the Director of Public Safety of the City of Miami. He received no compensation as such special police officer and his official status is not very definitely shown by the record. Section 24 (a) of the charter of the City of Miami—which is more of a negation than a definition—provided:

> No person, except as otherwise provided by general law or this charter, shall act as special police or special detective except upon written authority from the director of public safety. Such authority, when

conferred, shall be exercised only under the direction and control of the chief of police and for a time specified in the appointment.

It was argued by Petitioner in the Court of Appeals that the card issued to Williams was somewhat in the nature of a courtesy card and gave no authority to him to act as a policeman except under the explicit direction and control of the Chief of Police. It was not disputed, however, that Ford was a regular policeman of the City and was detailed to assist the detective Petitioner and the Supply Company in investigating the stealing. It is also shown that this police officer was present during the beatings and maltreatment of the suspects, although it does not appear that he actually participated in the assaults or that he personally administered any beatings to these suspects. Purnell, one of the victims, testified that Williams flashed a badge and stated that it was his identification, while Priest, another victim, testified that Williams informed him he was from the F. B. I. However, the Government undertook to support its allegation that Williams was acting under color of law by its showing that he was a special policeman of the City of Miami, pursuant to the charter of the City, and not as a federal officer.

There was ample evidence to show that Williams brought the suspects, Priest, Sturniolo, Purnell, and Robinson—singly—into a paint shack on the grounds of the Supply Company and there, in the presence of Ford, the city policeman, aided and abetted by Bombaci, Yuhas, and Perry, beat, struck, threatened, intimidated, and otherwise maltreated them so as to provoke admissions or confessions which justified, in the opinion of Williams, the arrest of three out of four suspects. The fourth was released upon the promise that he would become a spy and make reports on others. The records of the Miami Police Department

show Priest as having been "arrested by J. Williams and J. Avery". The record does not show that either of the victims was ever brought to trial for the alleged thefts.

A sentence of one year was imposed on Williams under each of the four substantive counts and to run consecutively for a total period of confinement of four years.

The Trial Court followed the direction of this Court in the Screw's Case[2] by charging the jury in conformity with that case that the defendant must have a conscious purpose to willfully deprive a person, the complaining witnesses, or either of them, of a specific constitutional right.

Specifications of Error

The Court of Appeals Erred:

1. In affirming the judgment of conviction of petitioner Williams.

2. In holding that this Court intended in the case of Screws v. United States, 325 U. S. 91 that the Federal government under Section 52, Title 18, U. S. C. take over the administration of criminal justice from the States to the extent of making every act depriving a person of a constitutional right or privilege by a state or municipal officer holding the merest shadow of authority, where such lawless act is in violation of the laws of such state.

3. In holding by its affirmance of petitioner's judgment of conviction that Section 52, Title 18, U. S. C. did not violate the United States Constitution, Fifth and Sixth Amendments, which require an ascertainable standard of guilt, fixed by Congress rather than by Courts, and secure to accused persons the right to be informed of the nature and cause of accusations against them.

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[2] *Screws v. United States*, 325 U. S. 91.

The Question Presented

1. DID CONGRESS IN THE PASSAGE OF SECTION 52, TITLE 18 U. S. C. (NOW SECTION 242 OF THE NEW CRIMINAL CODE) INTEND THAT THE FEDERAL GOVERNMENT TAKE OVER THE ADMINISTRATION OF CRIMINAL JUSTICE FROM THE STATES TO THE EXTENT OF MAKING EVERY ACT DEPRIVING A PERSON OF A CONSTITUTIONAL RIGHT BY STATE OR MUNICIPAL OFFICERS HOLDING THE MEREST SHADOW OF AUTHORITY OR PRETENDING TO BE SUCH OFFICER WHERE SUCH ACT, i. e., OF SIMPLE ASSAULT AND BATTERY IS AGAINST THE LAWS OF SUCH STATE?

THE APPELLATE COURT BELOW ANSWERED THIS IN THE AFFIRMATIVE.

2. DOES SECTION 52, TITLE 18 U. S. C. AS APPLIED TO THE FOURTEENTH AMENDMENT VIOLATE THE UNITED STATES CONSTITUTION, FIFTH AND SIXTH AMENDMENTS WHICH REQUIRE AN ASCERTAINABLE STANDARD OF GUILT TO BE FIXED BY CONGRESS RATHER THAN BY COURTS, AND SECURE TO ACCUSED PERSONS THE RIGHT TO BE INFORMED OF THE NATURE OF THE PROHIBITED CONDUCT?

THE APPELLATE COURT BELOW ANSWERED THIS IN THE NEGATIVE.

Summary of Argument

We are, of course, confronted with *Screws* v. *United States*, 325 U. S. 91 decided in 1945. The Screws decision reversed the lower Court because of the absence of the word "willful" in the Court's charge to the jury.

The two questions presented by petitioner herein were discussed at great length by this Court in the Screws decision by both the majority and dissenting opinions which totaled over 25,000 words.

The dissenting opinion of Justices Roberts, Frankfurter and Jackson is adopted by petitioner in support of his argument on said questions.

The vast reach and grave importance of the Screws decision is being discerned, viz.:

(a) Presidential Executive Order [3] on December 5, 1946, reciting that the Federal government is hampered

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[3] 9808, 11 Federal Register 14,153 (1946).

by inadequate civil rights statutes and the Department of Justice must be provided with the tools to do the job.

(b) The Report of the President's Committee on Civil Rights. Partial Recommendations:[4]

1. Amendment of Section 52 to impose greater penalties.

2. A new statute to supplement Section 52, specifically directed against police brutality and related crimes.

3. To eliminate "the handicap in the use of Section 52, imposed by the Supreme Court in Screws v. United States."

4. To spell out some of the Federal rights which run against public officers.

5. Establishment of regional offices as receiving centers of complaints.[5]

6. Establishment of the permanent Commission on Civil Rights in the Executive Office of the President.[6]

(c) The acceleration by judicial construction and not federal legislation of the concept of "national citizenship" with the same privileges and immunities as state citizenship.[7]

(d) The advance, case by case, by the Civil Rights Section of the Attorney General's Office, to have the standard of guilt as fixed under Sect. 52, Title 18, in the Screws decision to ultimately cover without federal legislation the entire range of constitutional privileges

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[4] pp. 156, 157 Report of President's Committee on Civil Rights.

[5] I. D. at 151, 152:

The Department of Justice has suggested that heads of these regional offices should have the status of Assistant United States Attorneys, thereby preserving the centralization of federal criminal law enforcement. The President's Committee is fearful that under this plan the goal of effective, courageous, nonpolitical civil rights protection in the field will not be reached unless satisfactory measures are taken to prevent these assistants from becoming mere political subordinates within the offices of the United States Attorneys.

[6] I. D. at 153.

[7] I. D. at 99, 113.

and immunities under the guise of the Fourteenth Amendment.[8]

(e) The vast undefined boundaries or scope of this new body of federal offenses under Section 52, Title 18, that now apply to situations where State law is in conformity with the Constitution and local misconduct is in undisputed violation of the laws of that State, it is bound to produce a confusion detrimental to the administration of criminal justice.

Argument

Screws v. *United States,* 325 U. S. 91 decided in 1945, illustrates an unsuccessful attempt to make Section 52 (now 242 of the New Criminal Code Title 18) play the role of a federal antilynching act. In this case, a Georgia sheriff, aided by a deputy sheriff and a local police officer arrested a Negro on a warrant charging him with the theft of a tire. The three men then beat the Negro to death. They were charged with having, under color of law, deprived their victim of his constitutional right under the Fourteenth Amendment to be tried by due process of law when charged with an offense against the state. They were convicted under the above statute in a Federal Trial Court. This Court set the conviction aside on the ground the trial judge did not properly charge the jury by requiring that anyone con-

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[8] I. D. at 117:

In using Section 51 and Section 52 to protect specific rights, the Civil Rights Section has been compelled to employ an experimental technique and to endeavor to extend the list of these rights, case by case. Considerable success has been achieved in this undertaking, and action in the future may expand further the list of rights under Section 51 protected against interference by private individuals. The list of federal rights running against interference by state officers and protected by Section 52 is a somewhat more definite one. Decisions of the Supreme Court in recent years have read many of the rights established by the first ten (10) Amendments into the Fourteenth Amendment. This has made them federal rights against state interference.

Also I. D. at 109.

victed under the section must have had a conscious "Purpose to deprive a person of a specific constitutional right. . . . One who does act with such specific intent is aware that what he does is precisely that which the statute forbids." [9]

The headnote of the Screws decision shows it was reversed without concurrence by a majority of the Court in the grounds of reversal.

In *Screws* v. *United States, supra,* it was argued as here that the defendants did not act "under color of any law" within the meaning of Section 20 of the Criminal Code. In rejecting this contention Mr. Justice Douglas held p. 108:

> Some of the arguments which have been advanced . . . suggest that the question under Sec. 20 is whether Congress has made it a Federal offense for a state officer to violate the law of his state. But there is no warrant for treating the question in state law terms. The problem is not whether state law has been violated but whether an inhabitant of a state has been deprived of a Federal right by one who acts under "color" of any law. He who acts under "color" of law may be a Federal officer or a state officer. He may act under "color" of Federal law or of state law. The statute does not come into play merely because the Federal law or the state law under which the officer purports to act is violated.

However the dissenting Justices Roberts, Frankfurter and Jackson said p. 148, *supra*:

> But assuming unreservedly that conduct such as that now before us, perpetrated by state officers in flagrant defiance of state law, may be attributed to the state under the Fourteenth Amendment, this does not make it action under "color of any law". . . . There is not the slightest warrant in the reason of things for tortur-

[9] Justice Douglas majority opinion 325 U. S. 91.

ing language plainly designed for nullifying a claim of acting under a state law that conflicts with the Constitution so as to apply to situations where state law is in conformity with the Constitution and local misconduct is in undisputed violation of that state law. In the absence of clear direction by Congress we should leave to the states the enforcement of their original law, and not relieve states of the responsibility for vindicating wrongdoing that is essentially local or weaken the habits of local law enforcement by attempting reliance on Federal authority for an occasional unpleasant task of local enforcement.

The dissenting Justices further stated p. 157, *supra*:

> This case does not involve denying adequate power to Congress. There is no difficulty in passing effective legislation for the protection of civil rights against improper State action. What we are concerned with here is something basic in a democratic society, namely, the avoidance of the injustice of prohibiting conduct in terms so vague as to make the understanding of what is proscribed a guess work too difficult for confident judgment even for the judges of the highest Court in the land.
>
> By holding, in this case, that State officials who violate State law nevertheless act "under color of" State law, and by establishing as Federal crimes violations of the vast, undisclosed range of the Fourteenth Amendment, this Court now creates new delicate and complicated problems for the enforcement of the criminal law. The answers to these problems, in view of the tremendous scope of potential offenses against the Fourteenth Amendment, are bound to produce a confusion detrimental to the administration of criminal justice.

It was also contended by petitioner in the Appellate Court that the Government had not proved that Williams was authorized by any law to make an arrest or detain the complaining witnesses. The co-defendant Ford, was sent to

the Lindsley Lumber Co. by his Superior Officer, Barker on the request of Williams, as a private detective, hired by the Lindsley Lumber Company. It can be assumed Ford was sent in order to make a legal arrest of complaining witnesses. This is borne out by the testimony of Chief of Detectives of Miami, Mr. Barker (R. 186).

Justice Douglas in the majority opinion in the *Screws* case, *supra*, said:

> We are not dealing here with a case where an officer not authorized to act nevertheless takes action. Here the state officers were authorized to make an arrest and to take such steps as were necessary to make the arrest effective. They acted without authority only in the sense that they used excessive force in making the arrest effective. It is clear that under 'color' of law means under 'pretense' of law. Thus acts of officers in the ambit of their personal pursuits are plainly excluded. Acts of officers who undertake to perform their official duties are included whether they hew to the line of their authority or overstep it. . . .

The special police officer's authority granted to Williams did not authorize him to make an arrest. Petitioner contended that the Government did not prove this vital point as to the extent of the authority of Williams to make an arrest or to take such steps as were necessary to make the arrest effective.

The Trial Court charged the jury (R. 320, 321) on "color" of law, viz.:

> The essential issue on this question is this. As I have previously indicated, the Federal Statute under which the defendants are here on trial under counts Two, Four, Six and Eight, has no application to a citizen who acts without color of law; that is, of his own personal volition for his own personal reasons. The act upon which these counts are based, applies only when and only to one who acts under the guise or pretense of

authority of law. This statute was not designated to reach private personal controversies between two people. So under these counts, if you find from the evidence that the defendants were not acting under color of law, but solely in their individual capacities, because of personal animosity toward these men, then what they did constitute only a violation of the State law, which should be remedied in the State courts of Florida and is not a violation of any Federal law. But, as I said before, if these men were taken into custody by the defendants, or either of them, and held by defendants, under color of law, by reason of the positions held by the defendants, or some of them, then the ordeal to which the defendants are alleged to have subjected these men, if they did so subject them, constituted a violation of the Federal Statute.

Your attention is further specifically called to the language of the statute upon which these counts are based, which provides that "whoever, under color of law," etc., does the act prohibited, shall be guilty of the offense defined in the statute. Now color of law means a mere semblance of legal right. So, color of law, as used in the statutes, does not necessarily mean the exercise of some specific legal authority vested in an officer of the law, but also semblance, appearance and pretense and implies, in the language of the statute, that the act to which it applies need not necessarily have the real characteristics of a legal act. Therefore, we do not have in this case any question as to whether the defendants, in taking these men into custody and holding them in custody, acted under authority of any law of Florida, but whether or not the taking of these men into custody was done under color of law of Florida, state, county or municipal, arising out of the official positions held by the defendants, or some of them.

The instruction to the jury requested by petitioner Williams and refused by the court (R. 339) was:

(2) Unless the defendants were wielding the power or authority of the State of Florida, or were acting in

their capacities as officers of the State, there can be no offense, because an individual cannot deprive another person of privileges or immunities guaranteed by the 14th Amendment to the Constitution of the United States.

Judge Waller referring to the Screws decision in the Court of Appeals of the Fifth Circuit (*Screws* v. *U. S.*, 140 F. 2d 662) in the opinion herein, *Williams* v. *U. S.*, 179 F. 2d 656 said:

> In *Screws* v. *U. S.*, *supra*, we said: "The deprivation of liberty or property or life under valid State law constitutes no offense under the act, but it is a pretense or color of law by one pretending to act under the authority of the State that calls the section into operation . . ."
>
> This conclusion seems to have been approved by the Supreme Court in its reversal, for other reasons, of our judgment in the *Screws* case, as revealed by the following statement by Mr. Justice Douglas:
>
> It is clear that under "color" of law means under "pretense" of law. * * * If, as suggested, the statute was designated to embrace only action which the State in fact authorized, the words "under color of any law" were hardly apt words to express the idea.

Petitioner contends if the majority rule in the Screws decision of this Honorable Court is not reversed, this Court should clarify the meaning of the application under the statute of 'color of law'.

Following the Screws decision of this Court the Court of Appeals, Fifth Circuit affirmed the conviction in *Crews* v. *U. S.*, 160 F. 2d 746, and Judge Waller stated, p. 747:

> The defendant, although guilty of a cruel and inexcusable homicide, was indicted and convicted merely of having deprived his helpless victim of a constitutional right under strained constructions of an inadequate Federal Statute, and given the maximum sentence

under that statute of one year in prison and a fine of $1,000.

The statute referred to was Section 52 supra.

Petitioner contends that Congress did not intend under the statute that every illegal discrimination, or violation of a constitutional right by a state official acting in violation of state law would be state action for the purpose of a criminal or civil action in a federal court. The Screws decision and the federal cases beginning to stem from that decision are presently posing a practical problem of grave importance, to state officials of every grade of authority. Judges and governors of the states are not immune from the impact of the Screws decision which gave virility and a vast reach to the words "under color of any law."

The Court of Appeals of the Third Circuit in *Vall* v. *Stengel*, 176 F. 2d 697, p. 702 held:

> As we said in Picking v. Pennsylvania R. Co., 151 F. 2d. 240, the decision of the Supreme Court in the Screws case gave virile meaning to the phrase 'under color of any law'.

In *Picking* v. *Pennsylvania R. Co.*, 151 F. 2d 240, Plaintiffs were arrested and charged under New York state law of placing an advertisement on the Flag of the United States. A Civil action was brought under the Third Civil Rights Act (Title 8 U. S. C. Sec. 43)[10] by the Pickings against various state officials including the Governor of the State of Pennsylvania, a State Judge, and the Railroad Company. The Court of Appeals, 3rd circuit, supra said:

> As we read R. S. Sec. 1979 (8 U. S. C. 43) in the light of the Screws decision we are compelled to the conclusion that Congress gave a right of action sounding in

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[10] Title 8 U. S. C. Sec. 43.
Civil Action for Deprivation of Rights.

tort to every individual whose federal rights were trespassed upon by any officer acting under pretense of state law. A field was created upon which a state officer could not tread without being guilty of trespass and liable in damages. The concept is clear enough but the boundaries of the forbidden territory are ill-defined. Mr. Justice Douglas stated the danger vividly when he said in the Screws decision: 'The treacherous ground on which state officials, police, prosecutors, legislators, and judges would walk is indicated by the character and closeness of decisions of this court interpreting the due process clause of the Fourteenth Amendment. . . . Those who enforced local law today might not know for many months (and meanwhile could not find out) whether they did deprive someone of due process of law. The enforcement of a criminal statute so construed would indeed cast law enforcement agencies loose at their own risk on a vast uncharted sea.'

The Court of Appeals in the *Picking* case held:

The statute must be deemed to include members of the state judiciary acting in their official capacity.

Where cause of action against Governor of Pennsylvania, based on his acting upon warrant for extradition of plaintiffs to New York arose under third civil right act, Pennsylvania statutes relieving Governor from liability for his official conduct, if he based it upon advice from Department of Justice, could not relieve him from civil liability.

The Court of Appeals in *McShane* v. *Moldovan*, 6th Circuit, 172 F. 2d 1016, pp. 1020, 1021 held:

The sections of the statute, Title 18, U. S. C. A., Sec. 52 and 88, which were before the court in the Screws case, are not before us in the instant case. Here Title 8 U. S. C. A. Sec. 43, is before us for construction; but it is to be construed as in pari materia with Title 18, U. S. C. A. Sec. 52, making such conduct a criminal offense. Picking v. Pennsylvania R. Co., 3 Cir., 151 F. 2d 240. Certiorari denied 332 U. S. 776, 68 S. Ct. 38.

Robert L. Hale in an article entitled Unconstitutional Acts as Federal Crimes, Harvard Law Review, Vol. 60, p. 65, at p. 109, states in a discussion of the *Screws* case:

> The official report of the *Screws* case opens with the words:
>
> > Mr. Justice Douglas announced the judgment of the Court and delivered the following opinion, in which the Chief Justice, Mr. Justice Black and Mr. Justice Reed Concur.
>
> The opinion of the four Justices is thus not the official opinion of the Court, nor are the views expressed separately by Mr. Justice Murphy, Mr. Justice Roberts, Frankfurter and Jackson. . . . Just what construction the Court may eventually give to Section 20 and to Section 19 remains to be seen. In view of the confusion in the Court's construction of them, congressional clarification may be called for.

The dissenting opinion of the Screws decision at page 157 supra suggests that the strained constructions of the statute can be avoided in that:

> . . . There is no difficulty in passing effective legislation for the protection of civil rights against improper State action.

A review entitled State Action and the Enabling Clause of the Fourteenth Amendment discussed the report of the President's Committee on Civil Rights in the Illinois Law Review, Vol. 44, pp. 199-211 (1949) and on pp. 199-200 stated:

> . . . The purpose of this comment is to appraise the constitutional support for such legislation and to explore the possibility of increasing the area of civil rights protection by use of the enabling clause of the Fourteenth Amendment.
>
> The Fourteenth Amendment.

> The seldom-mentioned enabling or enforcing clause of the Fourteenth Amendment provides: "The Congress shall have power to enforce by appropriate legislation the provisions of this article."[11] To be authorized under this section, legislation must be expressly for a purpose defined in the first four sections of the Amendment and appropriate for accomplishing the purpose. The first section provides that no state (1) shall make or enforce any law abridging the privileges and immunities of citizens of the United States, (2) shall deny any person the equal protection of the laws, and (3) shall deprive any person of life, liberty or property without due process of law. It is, therefore, these prohibitions on the states in the first section of the Amendment that Congress can enforce by legislation under the fifth section, thus making legal the moral sanctions inherent in the Fourteenth Amendment.

And further on p. 210 supra:

> The power granted to Congress by the fifth section to enforce the Amendment, although only as broad as the rights specified in the other sections, is nevertheless a specific grant of power. It is from the fifth section that Congress can declare that certain state action violates the provisions of the Fourteenth Amendment. However, if Congress would declare that certain action or conditions have the effect of denying citizens of one of the protections of the Fourteenth Amendment, then the States and their citizens would be put on notice that certain types of private action deny citizens their legal rights.

and on . . . pp. 202-203:

> . . . While it is true that the Amendment is directed at state and not private action it would be logical for Congress to declare just what action or inaction of

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[11] . . . U. S. Const.: Amendment XIV, Sect. 5.

the state constitutes a denial to persons of due process of law, of the equal protection of the laws, or of their privileges and immunities as citizens of the United States.

Second Question

DOES SECTION 52, TITLE 18 U. S. C. AS APPLIED TO THE FOURTEENTH AMENDMENT VIOLATE THE UNITED STATES CONSTITUTION, FIFTH AND SIXTH AMENDMENTS, WHICH REQUIRE AN ASCERTAINABLE STANDARD OF GUILT TO BE FIXED BY CONGRESS RATHER THAN BY COURTS, AND SECURE TO ACCUSED PERSONS THE RIGHT TO BE INFORMED OF THE NATURE OF THE PROHIBITED CONDUCT?

THE APPELLATE COURT BELOW ANSWERED THIS IN THE NEGATIVE.

The dissenting opinion of Mr. Justice Roberts, Mr. Justice Frankfurter and Mr. Justice Jackson is adopted by petitioner in support of the affirmative of the above question.

The careful consideration of this vital question by the dissenting Justices is reflected by their able opinion.

Even the proponents of the separate, unofficial views expressed by Justices Murphy and Rutledge in the Screws decision appear to be critical of the majority, unofficial opinion in: Comments, Vol. 44 Michigan Law Review p. 814, at pp. 821-822.

> When applying intentional conduct as a standard of guilt, Justice Douglas does so in terms of rights to be determined at some future time and concludes that there is no ascertainable standard of guilt. His criteria of "specific intent," however, is applied to "decisions" and rules of law" that have been previously determined. It seems clear that the certainty or uncertainty thus obtained is not derived from the statute but results only from the standard used, i. e., whether the rights involved have been determined by prior or by subsequent decisions. Since intent merely described the state of mind which is required to accompany a proscribed act, a statute must be certain or

uncertain, not in the terms of the intent required, but in terms of itself. Failure to accept the view propounded by Justices Rutledge and Murphy seems to lead either to the exaggerated concreteness demanded by Justice Roberts or the illogical and unnecessary confusion created by Justice Douglas.

The author points out in a note under the above:

> [38] It is interesting to note that before the Classic case it was thought on the authority of Newberry v. United States, 256 U.S. 232, 41 S. Ct. 469 (1921), that primaries were not elections and therefore did not fall within the sphere of federal power. In a sense, therefore, the defendants in the Classic case had no warning that they were depriving anyone of a federally protected right.

Conclusion

It is respectfully submitted that the judgment of conviction of petitioner should be reversed for the reasons given by the dissenting Justices in the Screws decision.

Respectfully submitted,

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